



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL SUIT NO.10 OF 2013

BENSON NG'ANGA NDIRANGU.....PLAINTIFF

VERSUS

ECO BANK KENYA LIMITED.....DEFENDANT

J U D G M E N T

[1] **Benson Nganga Ndirangu** is the plaintiff herein. He seeks a declaratory order to the effect that the defendant, **Eco-Bank Kenya Ltd**, has breached terms of the agreement dated 21st March 2011, entered between them and therefore prays for general damages for breach of contract together with costs and interest of this suit.

[2] In the statement of claim dated 10th June 2013, the plaintiff pleaded that on or about the 31st March 2011(sic), he entered into an agreement with the defendant that all loan facilities given to him by the defendant be consolidated and restructured on repayable amount and period, which agreement was duly executed and therefore bound the parties. Pursuant to the agreement, the defendant agreed that the outstanding loan of ksh.10,300,000/= be repaid at a rate of ksh.199,505/= per month for a period of 106 months with effect from 1st June 2011 until payment in full.

[3] That: it was further agreed that the repayment of the outstanding loan facility of ksh.10,300,000/= was to be offset against rent of ksh.200,000/= payable to the plaintiff by the defendant per month for the banking hall facility owned by the plaintiff and leased from him by the defendant. The rent was payable quarterly and in advance to offset the loan facility.

[4] The plaintiff contended that the defendant refused, failed and/or ignored to honour its part of the agreement thereby causing him to suffer loss and damages. Also that, the statement of accounts respecting A/C No. xxxx held with the defendant concerning the loan restructuring agreement dated 21st March 2011, has continued to increase and failed to take into consideration payment of rent in reduction of the balance which then stood at ksh.11,665,637/16 as at 30th April 2013, which amount is unlawful, illegal and extortionist in intent.

[5] The plaintiff further contended that the defendant has been in active occupation of his premises situated on plot No.Busia Municipality/530 for a period of twenty six (26) months since the agreement at the monthly rent of ksh.200,000/= payable quarterly in advance, hence a total of ksh.5,440,000/= should be factored in settlement of the loan agreement dated 21st March 2011. He therefore prays that the amount which is rent due to him from the defendant be factored in the balance on the loan account.

[6] The plaintiff also prays for a declaratory order that the sum owed to the defendant in terms of the agreement dated 21st March 2011 is ksh.10,300,000/= less rent due and payable to him for 26 months in the sum of ksh.5,440,000/= and not ksh.11,665,637/= indicated in the statement of account respecting A/C No.xxxx dated 31st May 2013. The plaintiff pleaded further that the defendant by a letter of offer accepted by him specified that a banking premises measuring 5000 sq ft be constructed for its usage and pursuant to the offer and demand, a business premises of 5000 sq ft was constructed on plot No.Busia Municipality/530. The defendant however, breached the agreement by taking and utilizing only 2500 sq ft and leaving the remainder 2500 sq ft unutilized since the year 2009.

[7] The plaintiff contended that he has suffered loss estimated at ksh.200,000/= per month since 2009, hence claims damages for breach of contract. That, due to the unique nature of the defendant's business of banking, he has been unable to lease or find a tenant for the unutilized space of 2500 sq ft situated above the banking hall occupied by the defendant and has therefore been unable to mitigate the loss due to security reasons of which the defendant is aware.

[8] The plaintiff ultimately prays for judgement against the defendant for failure and refusal to make good the loss suffered by himself despite the demand made to them. However, in a statement of defence dated 20th September 2013, the defendant acknowledged the agreement made between itself and the plaintiff to restructure the loan but denied that the loan instalments were to be offset in the form of rent payable by itself on premises belonging to the plaintiff occupied by itself.

[9] The defendant contended that the plaintiff failed and/or neglected to pay the scheduled monthly instalments as and when they fell due thereby causing his loan account to fall into arrears and attracting default interest rates. The defendant further denied being in breach of the agreement, set out in the letter of offer dated 21st March 2011, and in particular by failing to take into consideration the rent due and payable to the plaintiff as the rents if any were duly paid to the plaintiff's account with the defendant on their due dates in terms of the lease agreement entered between the parties.

[10] The defendant contended further that the loan restructuring Agreement dated 21st March 2011 and the lease Agreement over Busia Municipality Block 530 are distinct with separate terms and conditions which have been fully complied with by itself. The defendant therefore prays for dismissal of the plaintiff's claim with costs.

[11] In addition to filing their respective witness statements both the plaintiff and the defendant testified and led evidence in court in support and affirmation of their respective pleadings.

Both parties oral evidence was more or less a reiteration of their witness statements.

The plaintiff's statement is dated 26th May 2014, while that of his key witness is dated 31st March 2021. The plaintiff testified as **PW1** and his key witness, **Douglas Okiring**, as **PW2**.

The defendant's statement dated 20th November 2020, was made through its Relationship Officer, **Rose Eteye**, who testified as **DW1**.

[12] From the pleadings and the evidence it is clear that no dispute arises with regard to the existence and validity of the agreement entered between the plaintiff and the defendant on 21st March 2011. It was on the basis of this agreement that this suit was instituted against the defendant bank. Indeed, it was the said agreement which created a contractual relationship between the parties. Therefore, the basic issue arising for determination by this court is whether the defendant bank breached any of the terms and conditions of the agreement as alleged by the plaintiff thereby causing him to suffer loss and damage.

[13] Apparently, the bone of contention was whether it was agreed between the parties that the rent payable by the defendant for leasing premises owned by the plaintiff would be utilized for the repayment of the loan amount by monthly instalments. This meant that the plaintiff and the defendant enjoyed a Landlord/Tenant relationship apart from their contractual relationship based on bank facilities extended to the plaintiff by the defendant in the form of a monetary loan of ksh.10,300,000/= payable by monthly instalments within a given period of time.

[14] For the avoidance of doubt, the dispute herein relates to the contractual relationship between the parties rather than their Landlord/Tenant relationship or Lessor/Lesee relationship. This was the relationship that was governed by the loan restructuring agreement made on 21st March 2011, whose terms and conditions were clearly stipulated in the contract document i.e. the letter of offer.

[15] Therefore, any reference to any other agreement in an attempt to interpret the actual contractual agreement would not be relevant for the purposes of this case, nor would it offer any probative value in establishing the claimant's pleadings.

A perusal of the letter of offer dated 21st March 2011 i.e. the contract document, indicates that the loan as restructured was for the sum of ksh.10,300,000/= and its purpose was to consolidate the existing mortgage and term loan facility and enable the borrower (**plaintiff**) service as one facility. It is instructive to note that this clause did not indicate that the restructuring of the loan also doubled up as a merger of the agreement with the already existing Lessor/Lesee agreement between the parties which was a separate and independent agreement.

[16] The repayment clause in the material agreement was the most important and seems to have been the factor which ignited this suit. It clearly stated that:-

“The bank may in its sole discretion accept repayment of the facility over a period of 106 months which payment shall be made quarterly with effect from 30th day of the first month of the quarter next following the restructure date and subsequent instalments shall be paid on the 30th day in every succeeding quarter hence ensuing by way of equal monthly instalments of ksh.199,505 on being understood however that the bank may at any time while the facility is outstanding demand immediate repayment of all outstanding amounts or alter the manner or schedule of repayment.”

[17] It is axiomatic that the clause does not provide for the repayment of the loan in any other manner than that stipulated therein. There is absolutely no indication that the loan would be repaid on a monthly basis from the rent due from the bank (**defendant**) to the plaintiff for leasing premises belonging to the plaintiff erected on land parcel No. Busia Municipality/530 which was used as a collateral or security for the repayment of the loan.

[18] Indeed, the plaintiff conceded herein that the lease agreement existing between him and the defendant did not specify that the rent payable by the defendant would be used to offset the restructured loan. In the circumstances, any dispute relating to the lease agreement ought to have been a subject of a different suit and not the present one. Undoubtedly, the plaintiff did herein make an attempt to shoot two birds with one stone, hitherto unsuccessfully, by merging separate and distinct claims in this suit.

[19] The plaintiff alluded to there being a separate agreement also dated 21st March 2011 for the repayment of the structured loan from the amount due from the defendant as rent for leasing premises belonging to the plaintiff. However, no such agreement was exhibited or produced as evidence in this case. Another agreement said to be dated 31st April 2011, was mentioned by the plaintiff but never tendered herein as evidence.

[20] Basically, any agreements between the plaintiff and the defendant relating to the lease agreement had nothing to do with the loan agreement material to this suit. These included the alleged agreement to improve the plaintiff's premises by an additional five thousand (5000) square feet, for occupation by the defendant.

[21] For all the foregoing factors, it would follow that the plaintiff has failed to prove that the defendant breached any of the terms and conditions stipulated in the contractual letter of offer dated 21st March 2011. He would therefore not be entitled to damages from the defendant for any loss incurred by himself. At least, not on the basis of the agreement material to this suit.

In the upshot, the plaintiff's claim against the defendant is hereby dismissed with costs to the defendant.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[DELIVERED AND SIGNED THIS 6TH DAY OF OCTOBER 2021]